SUBJECT INDEX

	Page
OPINION OF THE COURT BELOW	1-2
JURISDICTION	2
STATEMENT OF THE CASE	2-6
ARGUMENT	7-16
SUMMARY OF ARGUMENT	7
POINT A	7-8
POINT B	8-15
POINT C	15-16
CONCLUSION	16

INDEX OF CASES CITED

Grays Harbor Stevedore Co. v. U. S., 5 Fed, 2d 585 (1925)	12
Morse Dry Dock v. U. S., 1 Fed. 2d 233 (1924)	12 & 13
The Capitaine Faure, 7 Fed. 2d 131 (1924)	12
The Jack-O-Lantern, 258 U. S. 96	11
The Lord Baltimore (D. C. Pa. 1921), 269 Fed. 824	12
The Pacific, 18 Fed. 703	16
The Pakanoket, 156 Fed. 241 (1907)	15 & 16

TABLE OF CASES CITED—Continued

Page

The Rescue, Pa. D. C. 1902, 116 Fed. 380 16

U. S. et al v. Carver et al., 260 U. S. 482 (1923) ..... 9 & 13

The Western Wave (CCA La. 1935), 77 Fed. 2d, 695, certiorari denied, 56 Sup. Ct. 156, 296 U. S. 633 11

OTHER AUTHORITIES CITED

Act of June 23, 1910—Chapter 373 10

United States Code Annotated, Title 46, Secs. 971, 972, 973 ..... 10 & 14

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 330

RED TOP SUPER MARKETS, INC., ET AL.,

Petitioners,

versus

H. W. FINDLEY, Claimants of the Motor Vessel, "QUEEN ANNE,"

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION OF THE COURT BELOW

The decision sought to be reviewed is the judgment of The United States Court of Appeals for the Fifth Circuit,

No. 13,355, entitled "H. W. FINDLEY, Claimant of the Motor Vessel "Queen Anne", Appellant, versus RED TOP SUPER MARKETS, INC., ET AL, Appellees," entered on May 10, 1951, re-hearing of which was denied by order of said Court on June 19, 1951. Neither the opinion of the Court, nor the order denying the petition for re-hearing have been reported.

JURISDICTION

Petitioners contend that the Supreme Court has jurisdiction to review the judgment below on the ground that said judgment is contrary to previous decisions of the United States Court of Appeals and of the Supreme Court of the United States. Respondent says that, although these statements purport to bring the petition within the purview of Supreme Court Rule 38, paragraph 5 (b), no decisions of the United States Court of Appeals or of the Supreme Court are cited which are in conflict with the decision of the Court below.

STATEMENT OF THE CASE

This cause comes up on a petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which Court reversed a final judgment of the United States District Court for the Southern District of Florida, In Admiralty, in favor of the petitioners as the libelants of the M/V "Queen Anne" for supplies furnished to said vessel on the order of one Hans G. Milton and for the services of a crew engaged by said Milton. The United States District Court's final decree for the libelants was based upon the finding that said Milton had

the apparent or presumptive authority to act as Master of the vessel. The owner of the vessel, H. W. Findley, had specifically denied any authority to bind the credit of the vessel, or the owner, for the amounts of the various libels.

One of the libelants in the United States District Court was Ukko Ahnger, on behalf of himself and as trustee for the other members of the crew, for wages and subsistence subsequent to their discharge.

The contents of the Transcript of Record on appeal from the United States District Court for the Southern District of Florida to the United States Court of Appeals for the Fifth Circuit, was stipulated, (T. 1-2), to which there was appended an "Agreed Statement of Facts" (T. 2-6).

The Agreed Statement of Facts shows as follows:

a. That H. W. Findley purchased the Motor Vessel "Queen Anne" at United States Marshal's sale in the City of Miami, Florida on April 25, 1949; that Bill of Sale was executed to him therefor on May 2, 1949; that he contended he was the sole owner of said vessel; that he left said vessel at Merrill-Stevens Dry Dock Company for the purpose of having certain repairs done and completed.

b. That on or about May 16, 1949, one Hans G. Milton called upon the attorneys for the said H. W. Findley in Miami, Florida, inquiring about the arrival of certain papers and instructions to said attorneys in connection with negotiations said Milton had been having regarding

the Motor Vessel "Queen Anne"; that thereafter the said Milton requested permission to go aboard said vessel for the purpose of taking an inventory pending the arrival of said papers and instructions, which permission was granted; that thereafter said Milton was permitted to board said vessel for the purpose of taking said inventory; that thereafter the said Milton ordered certain supplies and services from the libelants and engaged the services of a crew.

c. That notice was posted on board said vessel on May 30, 1949 that the said Milton was without authority from the owner and that any one aboard the said vessel, except the employees of Merrill- Stevens Dry Dock Company, was a trespasser; that notice was published in the daily newspapers in Miami, Florida that said Milton was without authority from the owner on May 31st, June 1st and June 2nd, 1949.

d. That the crew engaged by the said Milton refused to leave the said vessel until they were paid; that on June 14, 1949, said crew accepted a settlement of all claims up to and including May 30, 1949 and executed a release providing that said settlement was no admission of liability on the part of the owner or the vessel and that such release was without prejudice to any claim or suit for wages or subsistence after May 30, 1949, and that said crew would remove themselves and their effects immediately from said vessel.

e. That the sole question was whether said Hans G. Milton had any authority, either actual or apparent, that would bind the credit of the vessel or the owner for the

amounts of the various libels which had been sustained in the United States District Court.

It is respectfully submitted that there is nothing in the Agreed Statement of Facts that shows that the said Milton remained aboard the vessel, exercising apparent authority as a Master with the approval of Merrill-Stevens Dry Dock Company, custodian of the vessel, as is set forth at the top of Page 6 of Petitioners Brief in Support of the Petition for Writ of Certiorari.

In accordance with the stipulation of the contents of the Record on appeal filed in the cause in the United States District Court on August 11, 1950 (T. 1 & 2) the Court of Appeals had before it the original records and exhibits from the Court below, including a transcript of the testimony.

It was not disputed that the suppliers made no inquiry as to the authority of the said Milton.

The questions presented to and decided by the Court of Appeals below were these: (1) Whether one Hans G. Milton had authority to bind the owner of the vessel for the value of the supplies and services; (2) whether the crew of the vessel is entitled to wages for a stated period subsequent to its discharge.

As to the first question, the United States Court of Appeals for the Fifth Circuit held that the libelants had failed to sustain the burden of proof that Milton had any authority, either actual or apparent, to bind the credit of the vessel or its owner for the value of the supplies and services furnished.

As to the second question, the Court of Appeals below held that the notification on May 30, 1949 discharged the crew and that they were not entitled to wages and subsistence after that date.

The United States Court of Appeals based its reversal of the judgment of the United States District Court in favor of the libelants for supplies and services upon the authority of the decision of the Supreme Court of the United States in the case **United States, Et Al** vs **Carver, Et Al,** 260 U. S. 482, on Title 46, USCA, Sections 971, 972, 973 and on the decision in the case **Morse Dry Dock & Repair Co.** vs **United States,** 1 F. 2d 233, 237-238.

The United States Court of Appeals reversed the judgment of the United States District Court in favor of the libelant-crew and based its decision on the point that the crew was not entitled to any payment after their discharge on May 30, 1949 citing **The Pakanoket** (Fed. 241) and **The Rescue,** 116 Fed 380.

It is respectfully submitted that the decision in this case and the decisions cited by the United States Court of Appeals for the Fifth Circuit as the bases thereof, are not in conflict with any other decisions of the United States Court of Appeals or of The Supreme Court of the United States, as is inferentially stated on Page 6 of the Petitioners Brief in Support of Petition for Writ of Certiorari in referring to the decision of the District Court of Massachusetts in the case of **The Angie B. Watson** reported in 274 F, 218.

SUMMARY OF ARGUMENT

POINT A:

The reasons set forth by petitioners for review of the decisions of the United States Court of Appeals for the Fifth Circuit do not fall within the purview of Supreme Court Rule 38, 5(b).

POINT B:

The decisions in the **United States, Et Al vs Carver, Et Al** and **Morse Dry Dock & Repair Co. vs. United States** (Supra) and Title 46 USCA, Sections 971, 972, 973 are controlling in the instant case.

POINT C:

The contract of hiring under which Milton, without authority, engaged a crew was terminated when said crew had notice of the denial of Milton's authority, and they were not entitled to any further wages and subsistence for the period during which they refused to surrender possession of the vessel.

ARGUMENT

POINT A

Under Supreme Court Rule 38, paragraph 5 (b), The Supreme Court has indicated the character of reasons which will be considered as a basis for review on Writ of Certiorari of a decision of a Circuit Court of Appeals.

The petition in this case fails to show any special and important reasons for the review on Writ of Certiorari of the decision of the Circuit Court of Appeals, as indicated in the rule.

The only reason set forth by petitioners is their contention that the judgment of the United States Court of Appeals for the Fifth Circuit in this case is in conflict with the judgment of a District Court in **The Angie B. Watson,** 274 F 218, District Court D, Massachusetts, June 15, 1921, which decision is not conflicting because it is a decision of a District Court.

POINT B

When the suppliers who furnished services and supplies to the Motor Vessel "Queen Anne" libeled the vessel, they alleged in their libels that said supplies and services were furnished to the vessel at the instance and request of her agents and/or employees, which allegation placed upon said libelants the burden of proof to show by a fair preponderance of credible evidence that the said Hans G. Milton was the agent or employee of the owner and had authority to bind the credit of the vessel.

As was found by the Court of Appeals below, the said Milton was permitted to go aboard the vessel for the purpose of taking an inventory, and that thereafter he hired the crew and ordered the supplies and services; that none of the suppliers made inquiry as to the authority of Milton; that the matter of ownership of the vessel was a matter of public record; and Milton's lack of authority could have been readily ascertained by the suppliers by a routine inquiry and investigation.

The Court of Appeals below held that the libelants had failed to carry their burden of proving that Milton had any authority, either actual or apparent, to bind the credit of the vessel or its owner for the value of the supplies and services furnished because of their failure to inquire as to the authority of the person ordering such supplies and services, citing the case of the **United States** vs **Carver, Et Al** (Supra) and quoting therefrom as follows:

> " . . . The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualifies the whole in section 3 as follows: 'but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.' We regard these words as too plain for argument. They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the Material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms . . . "

The decision in the **Carver** case was under the Act of June 3, 1910, chapter 373. Thereafter the Act of June 5, 1920, chapter 250, Section 30, subsection R-41, STAT. 1005, Title 46 was enacted which later statute the Court of Appeals below cited, referring to USCA Title 46, Sections 971, 972, 973, which reads as follows:

> "Sec. 971: Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of the vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by a suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> Sec. 972: The following persons shall be presumed to have authority from the owner to procure . . . necessaries "for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.
>
> Sec. 973: The officers and agents of a vessel specified in Sec. 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could

> have ascertained, that because of the terms of the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor. June 5, 1920 c. 250 Sec. 30, Subsec. R-41, STAT. 1005"

In the annotations under this section appears the following:

> 'This section made no change in the general principles of the law of maritime liens.' The **Jack-O Lantern,** Mass. 1922, 42 S. Ct. 243, 258 U. S. 96, 66 L. Ed. 482.

The purpose of this section is stated as follows in the following annotation:

> 'This section and Sec. 973 of this title were not intended to take away any maritime lien existing by general maritime law, but were intended to require those who furnish necessaries to vessels as conditions precedent to existence of liens, to use reasonable diligence to ascertain that persons ordering necessaries have authority to bind such vessels.'

Citing **The Western Wave,** CCA La. 1935, 77 Fed. 2d 695, Certiorari denied, 56 S. Ct. 156, 296 U. S. 633, and on page 645, Note 8 of said annotations appears the following:

> 'One claiming lien for supplies . . . must at his peril make sure that the person ordering them

has actual or apparent authority to bind the vessel.' **The Lord Baltimore,** D. C. Pa. 1921, 269 Fed. 824.

See also **The Capitaine Faure,** 7 Fed. 2d 131, which was affirmed by the Circuit Court of Appeals, 2d Circuit."

See also **Morse Dry Dock & Repair Co.** vs. **United States,** 1 Fed 2d 233, in which the Court cited the Carver case, saying:

"In our opinion the Carver case is decisive . . . The libellant . . . was bound to inquire, and had no right to rest on presumptions; if he had inquired, if he had exercised reasonable diligence, he could have ascertained . . . that the Steamship Co., in ordering the repairs, was without authority to bind the vessel."

"In choosing to rely solely on the loose statements made to it by an officer of the Steamship Co., it did so at its own risk, and must abide the consequences. The facts were readily ascertainable; the inquiry into the facts was a duty under the statute . . . it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prudent man."

See also **Grays Harbor Stevedore Co.** vs. **United States,** 5 Fed. 2d 585.

The Court of Appeals below also stated in its opin-

ion that the language in the case of **Morse Dry Dock & Repair Company** vs. **United States,** 1 F. 2d 233, 237-238 was particularly applicable in the instant case quoting thereafter the following:

> "In our opinion the **Carver** case is decisive of the case now before the court. The libelant herein was bound to inquire, and had no right to rest upon presumptions. If he had inquired, if he had exercised reasonable diligence, he could certainly have ascertained the terms of the charter party, and that the Steamship Company in ordering the repairs, was without authority to bind the vessels."
>
> "In choosing to rely solely upon the loose statements made to it by an officer of the Steamship Company, it did so at its own risk, and must abide the consequences. The facts were readily ascertainable; the inquiry into the facts was a duty under the statute. And when a duty to make inquiry exists, it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prodent man."

In the instant case, the testimony of the suppliers was that they had made no inquiry at all as to the authority of Hans G. Milton. It is the contention of petitioners that the suppliers had a right to rely upon the mere fact of Milton's presence aboard the vessel as evidence of his apparent authority to bind the credit of the vessel or its owner, without making any inquiry or investigation as to whether Milton had any actual authority. Had such an

inquiry or investigation been made, the suppliers would have immediately found whether Milton had any authority, or not. The Court of Appeals below in its opinion (T. 31) stated:

> "This duty to exercise reasonable care and diligence in order to ascertain whether the person ordering the supplies and services for the vessel has authority to do so is a burden which the law imposes upon supplier and materialmen. Any other rule would encourage laxity in our admiralty laws, and place a premium on fraud and collusion between dishonest masters and those who extend credit to a vessel. In this case it is without dispute that the suppliers made no inquiry as to the authority of Milton."

The matter of a maritime lien in favor of one who furnishes repairs, supplies and necessaries to a vessel is governed in the United States by the statute defining the right of lien. (U.S.C.A., Title 46, Secs. 971, 972 & 973) It is an elementary concept of law that for one to avail himself of the protection and benefits of a statute, he must comply strictly with the other provisions of the statute. The failure of the suppliers in this case to make any inquiry at all as to Milton's authority brings them clearly within the provisions of U.S.C.A., Title 46, Sec. 973, debarring them from a maritime lien, which Section reads, in part, as follows:

> " . . . But nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of

the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor. June 5, 1920 C. 250 Sec. 30, Subsec. R-41, Stat. 1005."

POINT C

The Court of Appeals below stated that they could find no justification for any further payments to the crew of the vessel for wages and subsistence after the date of their discharge, that the crew was advised on May 30, 1949 of Milton's lack of authority to employ them, and that they were requested to leave the vessel at that time. (T. 31 & 32). The crew was paid for their services up until the date of their discharge.

The refusal to leave the vessel after their discharge was a tortious seizure of the vessel for which they insisted on additional wages and subsistance.

Even assuming the authority of Milton, the contract of hiring between him and the crew was verbal and for no specific time. Hence, it was terminable at will by either party.

The position of the respondent is sustained by the following case:

"**The Pakanoket,** (CCA 4th Cir. 1907) 156 Fed. 241—A verbal contract between the owner of a vessel and a marine engineer for the services of the latter, in which his wages were fixed at

> a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and, in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and upon the employee's discharge, he was entitled to wages only to the time of such discharge.'
>
> See also **The Rescue,** Pa. D. C. 1902, 116 Fed. 380; **The Pacific,** 18 Fed. 703.

As was stated by the Court of Appeals below in its opinion (T. 32):

> "Furthermore, they have received payment for services up until the date of discharge. We know of no rule in Admiralty law which entitles them to more." (Citing **The Pakanoket** and **The Rescue,** Supra)

It is therefore respectfully submitted that this case is not a proper one for review for certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

JOHN P. BOOTH,
FRANK J. O'CONNOR,
Counsel for the Respondent.

By Frank J. O'Connor
Frank J. O'Connor